UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/575
13 November 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 575

Case No. 635: BURTIS

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Arnold Kean; Mr. Ioan Voicu;

Whereas at the request of Farida Ghani Burtis, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 1 and 21 October, 21 November 1991 and 21 February 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 15 November 1991, the Applicant filed an application containing pleas which read, in part, as follows:

"Preliminary plea

...

Plea 1. Appellant urges the Administrative Tribunal to reject outright the contentions of the JAB [Joint Appeals Board] panel...

My appeal was filed on time--within two months of written notification of first acknowledgement of administrative decisions that disregarded my UN official employment record, in my official status file in Personnel Records, OHRM. The only date that is relevant is that of written notification, that is July 27, 1989. ...

Plea 2. Retyping of all materials listed in two memos dated Dec. 31, 1987 and Jan. 25, 1988, ... to conform to stipulations of ST/AI/240 Rev.2

'Performance Evaluation System' and ST/AI/292 on filing of adverse materials... Substitution of OS [Official Status] files information ... by incorporating comparable info[rmation] on me.

Plea 3. ... I request a statement by the Administrative Tribunal indicating discrimination against a US citizen, myself, ...

Plea 4. Consideration for other positions as remedial action for non-compliance of UN rules.

Plea 5. Monetary compensation in the amount of at least two years base salary, as specified in article 9 of the Statute ... [and] a higher indemnity fixed by the Tribunal, in accordance with paragraphs 1 and 3 of article 9, plus three months net base salary for procedural delay.

Plea 6. ...

..."

Whereas the Respondent filed his answer on 30 December 1991;

Whereas the Applicant filed written observations on 25 August 1992;

Whereas, on 15 October 1992, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant was initially recruited by the United Nations as an Assistant Information Officer in the Department of Public Information (DPI) on a short-term appointment at the P-2 local level, for the duration of the 22nd session of the General Assembly, through 20 December 1967. She re-entered the service of the United Nations on 22 September 1981, also on a short-term appointment at the P-2 local level, as an Associate Information Officer for the duration of the 36th session of the General Assembly, through 16 December 1981. She then served on a number of Special Service Agreements as a panellist on World Chronicle television programmes, at the request of DPI. Between 1982 and

1989, she applied, unsuccessfully, for a number of UN positions with DPI.

On 7 June 1985, the Applicant wrote to the Director of Recruitment, in the Office of Personnel Services, alleging that she had not been selected for any of the posts for which she had applied because of "adverse information" about her, submitted by DPI to the appointment and promotion bodies. She suggested that any such adverse material be removed from her file.

On 23 July 1985, the Applicant wrote to the Co-ordinator for the Improvement of the Status of Women in the Secretariat asking her to intercede in support of her job application. In further letters to different officials at the Office of Human Resources Management (OHRM)1/, the Applicant reiterated her allegations that she was not selected for the posts for which she had applied because of adverse material, allegedly contained in her official status file. She requested that, in conformity with the Secretary-General's instructions, all such material be purged or amended to conform with the official evaluations on her file.

On 4 March 1988, the Director, Recruitment and Placement Division, replying to letters by the Applicant dated 18 July 1987 and 25 January 1988, to the Assistant Secretary-General, OHRM, stated:

> "...I have consulted the Recruitment Officer in charge of DPI at that time, who assures me that there are no adverse materials, kept in a separate file in our Division regarding your case.
>
> Although I am aware that some Departments and Offices keep skeleton files on external candidates for their internal use, the Recruitment and Placement Officers are instructed not to take them into consideration if the material they contain was not directly submitted by the candidates themselves or has not been shown to them.
>
> As to your candidature for the post of Radio Producer in Hindi, I have ascertained from various sources including the Chairperson of the Appointment

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1/Successor to OPS

> and Promotion Committee that, at the time when the Committee considered candidates for that post, full and careful consideration was given to your application as collateral. However, another candidate was selected who, in the Committee's opinion, offered qualifications which were more closely related to the requirements of that particular vacancy.
>
> ..."

On 28 June 1989, the Applicant wrote to the Secretary-General, reiterating her allegations and stating:

> "Judging by the fact that no substantiation has been provided to me that your instructions [to remove any adverse material from personnel files] are in fact being carried out, ... I can only surmise that an administrative decision has been made not to respond to my request for compliance with your instructions and UN rules".

She requested, therefore, that her letter be considered as initiating the appeals process under staff rule 111.2 against non-compliance.

On 26 July 1989, the Applicant lodged an appeal with the Joint Appeals Board (JAB). Initially, the Presiding Officer of the JAB informed the Applicant that her letter "could not be considered a request for review of an administrative decision since she had not been a staff member since 1981." Subsequently, the JAB decided to consider the appeal and adopted its report on 18 June 1991. Its conclusion and recommendations read as follows:

> "Conclusion and Recommendation
>
> 16. The Panel met in executive session on 9 May 1990 and unanimously decided that the appeal was not receivable. There was no identifiable administrative decision against which an appeal could be lodged, and, in any event, more than seven years had elapsed between the time Appellant had left the Organization and her attempt to invoke the procedures specified in staff rule 111.2.

17. The Panel recommends that the appeal be rejected."

On 20 June 1991, the Officer-in-Charge, Department of Administration and Management, advised the Applicant that the Secretary-General had re-examined her case in the light of the JAB's report and had decided, in accordance with the JAB's recommendation, to reject her appeal.

On 15 November 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The Applicant filed a timely appeal, as the decision appealed was an on-going one, i.e. failure to remove adverse material from her file.

Whereas the Respondent's principal contentions are:

1. The Tribunal is only open to staff and former staff who file appeals relating to alleged violations of their conditions of employment. The Applicant's appeal in reality is complaining that she was not selected for positions since her separation from service. A former staff member complaining about non-selection for positions subsequent to separation from UN service has no standing before the Tribunal.

2. The Tribunal does not have jurisdiction to adjudicate the Applicant's claims relating to the contents of her Official Status file since those claims relate to matters arising subsequent to her separation.

The Tribunal, having deliberated from 21 October to 13 November 1992, now pronounces the following judgement:

I. In the present case, the Applicant challenges a decision of the Secretary-General accepting a unanimous recommendation of the Joint Appeals Board (JAB) that her appeal was not receivable because there was no identifiable administrative decision against

which an appeal could be lodged and that the appeal was, in any event, not timely, because more than seven years had elapsed between the time the Applicant had left the Organization and her attempt to invoke the procedures specified in staff rule 111.2.

II. The Respondent asks the Tribunal to find that it does not have jurisdiction ratione personae since the Applicant is not a staff member and is complaining about events that occurred subsequent to her separation from service. The Respondent bases his argument on article 2, paragraphs 1 and 2, of the Statute of the Tribunal. In the Applicant's view, failure by the Tribunal to consider the merits of this case or to award meaningful compensation would constitute a failure to exercise jurisdiction vested in it, within the meaning of paragraph 1 of article 11 of the Tribunal's Statute. Accordingly, the first question to be determined by the Tribunal is whether it is competent to decide this case in accordance with article 2, paragraph 3 of its Statute.

III. Article 2, paragraphs 1, 2 and 3 of the Statute of the Tribunal provide:

> "1. The Tribunal shall be competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. The words 'contracts' and 'terms of appointment' include all pertinent regulations and rules in force at the time of alleged non-observance, including the staff pension regulations.
>
> 2. The Tribunal shall be open:
>
> (a) To any staff member of the Secretariat of the United Nations even after his employment has ceased, and to any person who has succeeded to the staff member's rights on his death;
>
> (b) To any other person who can show that he is entitled to rights under any contract or terms of appointment, including the provi-

sions of staff regulations and rules upon which the staff member could have relied.

3. In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal."

IV. In the light of these provisions the Tribunal must consider whether the Applicant is a person having access to the Tribunal by virtue of paragraph 2. In that respect, the Tribunal notes that the Applicant has not served as a staff member since December 1981. Between 1982 and 1989, she applied, unsuccessfully, as an outside candidate, for a number of positions in DPI. She claims that she was not selected for any of these positions because of adverse material allegedly contained in her official status file. According to the Applicant "at the heart of this appeal is the fact that UN officials have made decisions not to implement mandatory UN rules concerning Applicant's official status file, and made false statements about her periods of UN employment".

V. The Tribunal notes that the Applicant is a former staff member complaining about her non-selection for a position in the Secretariat. The Tribunal is not competent to judge the manner in which external candidates are considered for posts within the Secretariat. The Tribunal is only open to the staff and former staff who file appeals relating to alleged non-observance of their contracts of employment. In the present case, the Applicant cannot allege the non-observance of a contract of employment because such a contract does not exist.

VI. The Tribunal recalls that, in case of divergent views between an applicant and a respondent concerning its competence, the matter is to be settled by a decision of the Tribunal, pursuant to article 2, paragraph 3 of the Statute of the Tribunal.

VII. As a result of its examination of the file and in the light of the foregoing considerations, the Tribunal concludes that the application does not fulfil the requirements of article 2, paragraphs 1 and 2 of its Statute.

VIII. For the foregoing reasons, the Tribunal declares itself not competent to consider the application.

IX. In view of this conclusion, the Tribunal cannot entertain the Applicant's claims.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Arnold KEAN
Member

Ioan VOICU
Member

New York, 13 November 1992

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/576
16 November 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 576

Case No. 619: MAKWALI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Arnold Kean; Mr. Hubert Thierry;

Whereas, on 26 March 1991, Humphreys M. Makwali, a former staff member of the United Nations Centre for Human Settlements, hereinafter referred to as UNCHS, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 11 September 1991, the Applicant, after making the necessary corrections, again filed an application containing pleas which read, in part, as follows:

"II. PLEAS

...

12. I request the Tribunal to find and rule that:

...

(b) The Secretary-General failed to implement in good faith the unanimous recommendation by the Joint Body on the amount of compensation to be paid and that he erred in basing the said compensation on the length of my stay in the UN (...) whereas the thrust of my appeal and the findings of the Joint Body ... was based on the damage ... the Secretary-General's improper decision ... inflicted on both my moral and professional standing;

...

13. In view of the foregoing I hereby invite the Tribunal to...

...

(d) Order:

(i) My reinstatement as a staff member of the United Nations in [the] same quality and capacity as that held by me on 31.12.88 [with] my seniority in service at the level where I would be now, or failing which, to find and rule that due process had not been observed in the procedural matters and ... hence order specific performance by the Respondent of the obligation incumbent upon him, in accordance with Staff Rules and Regulations and the consistent jurisprudence of the Tribunal, to conduct a bona fide search for a suitable post for me in the UN System following the filling of the post which I occupied...

(ii) Payment of my salary and allowances with interest covering the period from 1st January 1989 up to the end of this litigation during which time I have been compelled to remain unemployed...;

(iii) Payment to UN Joint Staff Pension Fund by the Respondent on my behalf of appropriate contributions, with interest covering the period 1.1.89 till the end of this litigation;

(iv) Appropriate compensation for moral and material injury resulting from the unjust decision...;

(v) Payment of appropriate and adequate compensation for the unreasonable and deliberate delay it took the Respondent to respond to my appeal...;

(vi) Appropriate compensation to cover the cost of filing this appeal ... in the range of $1000 to $1500.

14. That in the event the Secretary-General of the United Nations decides on the basis of fair and

objective reasons, a reinstatement is not in the best interest of the United Nations, I humbly and respectfully request the Tribunal to order:

(a) Payment of the entitlements which I would have enjoyed if my fixed-term appointment had been allowed to run its full course as recommended by my supervisor...;

(b) Damages in the amount equivalent to three years net base salary at the grade and step held at the time of my last contract i.e. G7/III...;

...

(d) Appropriate compensation to cover the cost of filing this appeal ... in the range of $1000 and $1500."

Whereas the Respondent filed his answer on 24 February 1992;

Whereas the Applicant filed written observations on 24 April 1992;

Whereas, on 20 October 1992, the President of the Tribunal ruled that no oral proceedings would be held in the case.

Whereas the facts in the case are as follows:

The Applicant entered the service of UNCHS on 5 May 1986. He was initially offered a six month fixed-term appointment as a Finance Assistant at the G-7 level in the Department of Common Services. His appointment was extended first, for two interim periods of one month each, and then, for two successive periods of one year, first, through 4 November 1987 and then through 4 November 1988. The Applicant's appointment was extended for a final fixed-term period of one month and twenty-six days, through 31 December 1988.

During the course of his employment with the UN, the Applicant's performance was evaluated in two Performance Evaluation Reports in which the Applicant's overall performance was rated "very good" and "good", respectively. On 31 October 1988, the Chief, UN Common Services, who was also the Applicant's supervisor, recommended to the Chief, Personnel, Recruitment and

Administration Section (PRAS), that the Applicant's appointment be extended for a further fixed-term period of one year, through 4 November 1989.

However, in a memorandum dated 22 November 1988, the Chief, PRAS, recommended to the Executive Director, contrary to the Applicant's supervisor, that the Applicant's appointment be extended for two months only. He noted: "Although the recommendation is for a one-year extension, as an investigation is going on, I would recommend at this stage, an extension of 2 months".

On 23 November 1988, the Acting Chief, Division of Administration, advised the Executive Director that he was "unable to support the recommendation of the Chief, PRAS" as he had no knowledge of "any 'investigation' presently taking place involving [the Applicant]". The investigation to which the Chief, PRAS, referred was a "working paper recently submitted for discussion by the Internal Audit Unit and which makes mention of a number of irregularities in the payment of UNCHS invoices." He stated in this regard: "There is nothing in that document which lays any blame on [the Applicant]. Thus to single him out for a two-month extension in the face of a good performance report by his supervisor will have the inevitable effect of pointing the finger of suspicion at him. This appears to me to be discriminatory and without cause." He therefore recommended that the Administration "accept the recommendation of [the Applicant's] supervisor for a one-year extension". Should the final report of the Internal Auditors contain any evidence of misconduct on the Applicant's part, the Applicant could then "be dealt with in accordance with applicable rules and procedures."

Nevertheless, the Executive Director decided that the Applicant's appointment would be extended through 31 December 1988 only.

In a communication dated 2 December 1988, the Applicant's supervisor expressed to the Chief, PRAS, his "utter astonishment and dismay" at learning that he had recommended to the Executive Director a two-month extension of the Applicant's appointment

"based on a phantom on-going investigation." As the allegations against the Applicant were "based on mere suspicion and had not been communicated to him, he urged the Chief, PRAS, to "either bring the adverse material to the [Applicant] to give him an opportunity to comment on it or alternatively retract and expunge the adverse material from the file...". This recommendation was not accepted by the Chief, PRAS, who informed the Applicant that his appointment would not be extended beyond 31 December 1988.

In a memorandum dated 5 December 1988, the Applicant asked the Chief, PRAS, for the reasons why his appointment had been extended for one month and twenty-six days only, instead of for one year, as recommended by his supervisor. He also asked to review his official status file. In addition, he stated that he had been obliged to sign the Letter of Appointment under duress. Upon examination of his personnel files, the Applicant discovered that the administrative decision concerning his appointment had apparently been taken on the basis of an ongoing investigation concerning procurement irregularities. Therefore, on 8 December 1988, he wrote to the Chief, PRAS, to request a copy of the draft Audit Report which "apparently forms the basis of your harsh decision".

On 16 December 1988, the Applicant requested the Executive Director to reconsider the administrative decision not to extend his appointment beyond 31 December 1988. Not having received a reply, on 24 February 1989, the Applicant lodged an appeal with the Nairobi Joint Appeals Board (JAB). The Board adopted its report on 11 February 1991. Its conclusion and recommendation read, in part, as follows:

"Conclusion

23. The Panel concluded that the Secretary-General's prerogative of letting a fixed-term appointment expire on the date specified in the letter of appointment was not put into question by this appeal.

24. It became evident from the consideration of circumstances that led to this appeal that the

> appellant was granted a final extension of one month and 26 days on the basis of suspicions against his conduct in exercising his duties which were not brought to his attention and which were not investigated under staff rule 110.3 on Disciplinary Measures and staff rule 110.4 on Suspension Pending Investigation.
>
> ...
>
> 26. Because of this procedural error, the Panel did not agree with the Administration's contention that the appellant's own statements of 21 and 23 March 1989 and the supervisor's memo of 29 April 1989 retroactively justified the action taken against the appellant's interests on 23 November 1988.
>
> 27. The Panel also concluded that the delay in providing the Respondent's reply is to be attributed to an unexplained oversight and neglect on the part of UNCHS Administration.
>
> 28. In the light of the above, the Panel concludes that the appellant is owed some form of compensation, and recommends an ex-gratia payment of six months salary and related benefits to the appellant. The Panel further recommends the removal of adverse material from his personal status file.
>
> 29. The report was adopted unanimously by the Panel on 11 February 1991."

On 1 March 1991, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him that:

> "The Secretary-General, having re-examined your case in the light of the Board's report, agrees with the Board's conclusion that you should be granted compensation. He feels, however, that the amount recommended by the Board is excessive in view of the length of your service of only two and a half years. Accordingly, he has decided to maintain the contested decision and that you be paid compensation in an amount equivalent to four months' net salary and related allowances, albeit not on an ex gratia basis, as recommended by the Board, but on the basis of a legal liability on the part of the Organization.

He has also decided to accept the Board's recommendation that all adverse material be removed from your file."

On 11 September 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are as follows:

1. The Respondent's decision not to extend the Applicant's appointment was tainted by prejudice, extraneous factors, procedural errors and violation of the right to a proper defence.

2. The Applicant was neither charged with misconduct nor dealt with under the proper disciplinary procedures required by the Staff Rules and PD/1/76.

3. The Secretary-General failed to implement, in good faith, the unanimous recommendation by the JAB.

Whereas the Respondent's principal contentions are as follows:

1. The Applicant had no legal expectancy of continued employment with UNCHS upon expiration of his fixed-term appointment.

2. The Applicant was granted adequate compensation for the procedural errors committed by the Administration.

The Tribunal, having deliberated from 21 October to 16 November 1992, now pronounces the following judgement:

I. The Tribunal considers that the documentation available to it is sufficient to enable this case to be decided, and that it is not necessary to require the production of further documents requested by the Applicant.

II. The Respondent admits that the Administration committed a procedural error in failing to conduct an investigation under PD/1/76 concerning the question whether the Applicant had been guilty of financial misconduct. This suspicion was not brought

to the Applicant's attention, so that he had no opportunity to answer the charges brought against him in what he describes as a "phantom investigation".

III. The Applicant's fixed-term contract, due to expire on 4 November 1988, was extended only until 31 December 1988, despite the recommendation of the Applicant's supervisor (the Chief of Common Services) that it should be extended for a year. The Applicant asserts that the decision of the Executive Director of UNCHS not to extend the appointment beyond 31 December 1988, was arbitrary and motivated by prejudice and procedural errors, without due process of law. The Applicant's principal request is for rescission of the Executive Director's decision and compensation for moral and material injury resulting from that decision.

IV. The Joint Appeals Board (JAB) has recommended that compensation should be paid to the Applicant and that the amount of compensa-tion should be the equivalent of six months net base salary. The Respondent has not denied that compensation is due, but considers that it should be the equivalent of four months net base salary.

V. The Tribunal finds that the Applicant has not discharged the burden of proof that the decision not to extend his appointment was influenced by prejudice or extraneous factors.

VI. However, the Tribunal also finds that the Administration erred in not making the charges of gross misconduct the subject of an investigation under PD/1/76. This it should have done before deciding not to extend the Applicant's contract. The Tribunal need not speculate as to the likely outcome of such proceedings; it is sufficient to establish that the Administration did not follow the procedure it had itself prescribed, thereby depriving the Applicant of whatever safeguards that

procedure would have afforded him. The Tribunal does not consider this omission to be a minor matter.

VII. The Tribunal accordingly finds, as did the JAB, that the Applicant was injured by the error on the part of the Administration and fixes, as compensation for the injury sustained, two months of the Applicant's net base salary at the time of his separation from service. This will result in the Applicant receiving the total amount recommended by the JAB.

VIII. In the light of the above, the Tribunal orders the Respondent:

(i) To pay to the Applicant two months of his net base salary at the time of his separation from service;

(ii) To remove from the Applicant's personnel file all adverse material arising in these circumstances, and

(iii) To provide the Applicant with a certificate that the Applicant was separated from the service of the United Nations because his fixed-term contract of employment had expired and not for any other reason.

IX. All other pleas are rejected, including the Applicant's request for the production of documents.

(Signatures)

Jerome ACKERMAN
President

Arnold KEAN
Member

Hubert THIERRY
Member

New York, 16 November 1992

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/577
17 November 1992
ENGLISH

ORIGINAL: FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 577

Case No. 617: KAOUAKIB

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Hubert Thierry;

Whereas at the request of Kenza Kaouakib, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 9 and 13 September 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 11 September 1991, the Applicant filed an application which contained the following pleas:

"4. The Joint Appeals Board [JAB] in its consideration of the Applicant's case erred in that it:

(a) did not fully apply its mind to the evidence which could have led to recommendations for:

(1) retroactive placement of the Applicant on probation effective May 1989;

(2) retroactive promotion of the Applicant from P-2 to P-3 effective April 1987; and

(3) an award of appropriate damages for the distress caused by ESCWA's discriminatory treatment; and

(b) rejected the evidence that would have proved the existence of discriminatory treatment.

5. The above errors by the JAB constitute the grounds of appeal in this case, and accordingly the Applicant requests joinder of three appeals, namely (a) that the period of probation should begin to take effect retroactively from May 1989; (b) that the Applicant should receive promotion effective April 1987; and (c) that the Applicant should receive compensation for the resulting distress which followed ESCWA's discriminatory treatment of the Applicant."

Wheras the Respondent filed his answer on 8 May 1991;

Whereas at the request of the Tribunal the Respondent produced documents on 12 November 1992, on which the Applicant submitted comments on 16 November 1992;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 8 October 1984, as an Associate Programme Management Officer in the Programme Evaluation Unit of the Programme Planning and Coordination Unit of the Economic and Social Commission for Western Asia (ESCWA). She served initially on an 11-month fixed-term appointment at the P-2, step 1 level, later converted to a two-year fixed-term appointment expiring on 7 October 1986. Her appointment was extended first, for a further fixed-term period of two months, through 7 December 1986, and then for 1 year and 10 months, through 7 October 1988.

On 25 September 1988, the Chief, Programme Planning and Coordination Unit, recommended to the Deputy Chief, Personnel Section, the conversion of the Applicant's appointment to a probationary appointment. He attached to the recommendation a performance evaluation report in which the Applicant received eight "C" (Good) ratings, six "B" (Very Good) ratings and two "A" (Excellent) ratings. Her overall performance was rated as a "good" performance. The Applicant instituted a rebuttal to her evaluation and the Panel constituted to evaluate the rebuttal recommended a number of upgradings in the performance report. The Executive Secretary, in his apraisal of the performance report dated 11 December 1988, accepted the recommendation of the Panel to

upgrade the ratings concerning "quality of work" and "quantity of work" to "B" (Very Good), since the Panel had not found "any evidence that the supervisor had given any indication to the [Applicant] of a declining performance in these areas of her work". Similarly, he concurred in the Panel's recommendation to upgrade her rating for oral Arabic to "B" on the grounds "that after four years in an Arabic-speaking environment ... [the Applicant's] oral expression would not have declined compared to that level rated in her previous evaluation". In addition, he approved an upgrading of the Applicant's overall performance to "Very Good" based on the Panel's opinion that "in reviewing the individual ratings in the [Applicant's] performance ... her overall performance has not declined from the previous reporting period". The Applicant's appointment was extended for a fixed-term period of three months, through 7 March 1989.

On 13 February 1989, the Chief, Division of Administration, ESCWA, transmitted to the Chief, Staff Administration and Monitoring Service at Headquarters, ESCWA's recommendations for the conversion of fixed-term appointments to probationary appointments, together with a request that the cases of the staff concerned be presented to the Appointment and Promotion Committee (APC). The Applicant was one of the staff members listed in the communication. In a memorandum dated 29 March 1989, the Chief, Division of Administration, ESCWA, recommended to the Chairman of the ESCWA APC the conversion of the Applicant's appointment to a probationary appointment. In support of his recommendation, he stated that the Applicant's services had been evaluated three times and that, in her latest report, her performance had been rated "Very Good". In addition, the Office of Human Resources Management (OHRM) at Headquarters supported the recommendation.

Pending action by the appointment and promotion bodies, the Applicant's appointment was extended for further fixed-term periods of 1 month and 23 days, through 30 April 1989, 2 months, through 30 June 1989 and 2 months, through 31 August 1989.

On 12 April 1989, the Chairman of the ESCWA APC transmitted to the Appointment and Promotion Board (APB) at Headquarters the APC's unanimous recommendation to convert the Applicant's fixed-term appointment to a probationary appointment.

On 25 April 1989, the Chairman of the APB at Headquarters informed the Chairman of the ESCWA APC that "on the basis of information provided regarding the [Applicant's] record, the Board would prefer that [the Applicant] be granted an additional one-year extension of her fixed-term appointment before being considered for grant of a probationary appointment". He asked for the Committee's views on the recommendation. In a reply dated 4 May 1989, the Chairman of the ESCWA APC informed the Chairman of the APB at Headquarters that the APC had "considered the Board's proposal and concurs with it as it saw insufficient ground to oppose it".

In a cable dated 20 May 1989, the Applicant asked officials of OHRM at Headquarters for an explanation of the rejection of ESCWA's recommendation to convert the Applicant's appointment to probationary. On 22 May 1989, the Assistant Secretary-General, OHRM, asked the Chairman of the APB to inform him "of the information that served as a basis for the APB's views and its rationale for specifically suggesting a one-year extension". No reply to this request is to be found in the Applicant's file.

At its meeting held on 8 June 1989, the APB at Headquarters maintained its recommendation not to grant the Applicant a probationary appointment, but recommended that instead of extending her appointment for one year, she should be granted a two-year fixed-term appointment. This recommendation was accepted by the Secretary-General and the decision was conveyed to the Chief, Personnel Section, ESCWA, in a memorandum dated 13 June 1989. The Applicant then was offered and accepted a 1-year-and-10-months appointment, expiring on 30 June 1991.

From 13 June 1989 to 17 January 1990, the Applicant was assigned to the United Nations Transition Assistance Group in Namibia.

In June 1989, the Applicant instituted a recourse procedure against the non-inclusion of her name in the 1987 P-3 Promotion Register.

On 23 August 1990, the Applicant requested the Secretary-General to review the administrative decisions not to promote her to the P-3 level and not to convert her appointment to a probationary appointment.

Not having received a reply from the Secretary-General, on 21 February 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 9 July 1991. Its conclusions and recommendations read as follows:

"Conclusions and Recommendations

35. Essentially, the Appellant's appeal is against the decision of the Secretary-General, contained in the memorandum dated 13 June 1989 from the Secretary of the APB to the Chief, Personnel Section, ESCWA, which indicated: 'on behalf of the Secretary-General, the Assistant Secretary-General for Human Resources Management endorsed the Board's recommendation noting that the staff member's fixed-term appointment should be extended for a further two years'.

36. The Panel has not been acquainted with the alleged facts that led the APB to come to its conclusion on the issue of a probationary appointment for the Appellant. The Panel recognizes that it must tread carefully when called upon to examine the findings of a body such as the APB. The Panel cannot help observing however that a staff member who on all objective criteria, appeared to qualify for conversion to a probationary contract was not granted the conversion on the basis of alleged information that has never been disclosed to her or for that matter, as far as the Panel is aware, has never been disclosed, on the record, to the ASG [Assistant Secretary-General], OHRM, either. The Panel is therefore compelled to find a fundamental lack of due process in the proceedings of the APB which changed the original unanimous recommendation of the APC at ESCWA for reasons which have never come to light.

37. The Respondent's decision to endorse the Board's recommendation is equally lacking in due process and is all the more strange in view of the memorandum dated 22 May 1989 from the ASG, OHRM, to the Chairman of the APB.

38. The Panel is therefore of the view that, due to extraneous factors, the Respondent's decision on the issue of conversion to probationary status runs contrary to the principles of justice and of due process and should therefore be remedied. Had the Appellant been granted a probationary contract at the time, in accordance with the original unanimous recommendation of APC at ESCWA, she would already have served a two year probationary period.

39. The Panel notes that, on the information available to it, the Appellant has had a good service record and was granted a Special Post Allowance to the P-3 level for the period 16 June 1989 through 17 January 1990 for her service with UNTAG.

40. The Panel recommends that, assuming the continued good performance of the Appellant, the Secretary-General consider taking into account the two year delay as the probationary period and that the shortest possible stages be followed henceforth in reviewing the Appellant for conversion to a career appointment."

On 17 July 1991, the Officer-in-Charge, Department of Administration and Management, transmitted to the Applicant a copy of the JAB report and informed her that:

"The Secretary-General has re-examined your case in the light of the Board's report. He fully agrees with the Board's findings on the question of non-promotion. With regard to the non-granting of a probationary appointment, the Secretary-General has concluded that the contested decision which granted you a two-year fixed-term appointment rather than a probationary appointment constituted a proper exercise of administrative discretion.

Without prejudice to the above conclusion, the Secretary-General has decided to accept the Board's recommendation that you now be considered with due dispatch for the granting of a permanent appointment."

On 11 September 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's refusal to convert the Applicant's appointment to a probationary appointment and his subjection of the

Applicant to discriminatory treatment at ESCWA were not in conformity with the Staff Rules and violated the Applicant's rights.

2. The JAB rejected evidence that would have proved the existence of discriminatory treatment.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to probationary appointment but only to reasonable consideration.

2. The Applicant has no right to promotion but only to due consideration, which consideration was given.

The Tribunal, having deliberated from 26 October to 17 November 1992, now pronounces the following judgement:

I. In the present case, the Applicant challenges the Secretary-General's decision of 17 July 1991. That decision accepts the rejection by the Joint Appeals Board (JAB) of the Applicant's contentions concerning the refusal to include her name in the register for promotion to P-3 (Second Officer) for 1987. On the other hand, the Secretary-General rejects the conclusion of the JAB as to the irregularity of the decision whereby the Administration failed to grant the Applicant a probationary appointment. The Secretary-General nevertheless agreed to comply with the Board's recommendation that the Applicant "be considered with due dispatch for the granting of a permanent appointment".

II. As regards the Applicant's allegations of discrimination against her, the Tribunal observes that the JAB considered that there was no need for it to pronounce on an allegation of discrimination if the discrimination alleged had no impact on the contested decision. The Tribunal shares this view. It notes that, in exchange for a new assignment which she requested and was granted, the Applicant agreed to withdraw her complaint of alleged discriminatory treatment. Furthermore, the JAB correctly

interpreted the Tribunal's case law with respect to the duties performed by the Appointment and Promotion Board (APB) in drawing up promotion registers. In this respect, the JAB noted that the Applicant had been in a position to provide the APB with all the necessary information. The Tribunal has found no reason to consider that the action of the appointment and promotion bodies was at all irregular. It has, however, learned that, following her appeal, the Applicant received no communication informing her of the APB's decision. It regrets this omission. Nevertheless, the Tribunal considers that inasmuch as this omission did not impede the Applicant's appeal to the JAB, it is without impact on the settlement of this case.

III. The Tribunal also has taken into consideration the JAB's recommendation on the refusal in 1989 to grant the Applicant a probationary appointment leading to a permanent appointment. The JAB concluded that the procedure followed in this matter by the APB was irregular since there was doubt as to whether the APB had taken into account information that was unfavourable to the Applicant, relating to her private life which had not been communicated to her. The Tribunal observes, however, that the Secretary-General, while rejecting the JAB's finding as to the invalidity of the APB's recommendation, nevertheless accepted the JAB's recommendation, so that the candidacy of the Applicant could be taken into consideration for a permanent appointment and the service already performed treated as probationary. According to information provided to the Tribunal by the Respondent, this procedure is being followed and the Applicant will not be required to serve a probationary period. The Tribunal therefore holds that the Applicant's complaint on this subject is no longer applicable. The Tribunal has every confidence that the Secretary-General will ensure that his decision is implemented shortly if this has not already been done.

IV. The Tribunal further considers that the decision which the Secretary-General took, pursuant to the recommendation of the JAB, to waive the probationary period is adequate compensation in this case for any damage which the Applicant may have suffered in her career advancement.

V. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Hubert THIERRY
Member

New York, 17 November 1992

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 578

Case No. 621: HASSANI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Hubert Thierry;

Whereas, on 24 September 1991, Souhila Hassani, a former staff member of the United Nations, filed an application the pleas of which read as follows:

"II. PLEAS

7. The Applicant respectfully requests the Administrative Tribunal to find that:

(a) the Respondent's decision not to renew the Applicant's contract beyond 31 December 1990 was based on ill-founded assessments of her performance;

(b) the Respondent had denied the Applicant proper redress;

(c) the Respondent denied the Applicant due process by:

(i) failing to respond to her request for a conciliatory procedure,

(ii) accepting the Joint Appeals Board report which improperly based its recommendation on ill-founded assessment of the Applicant's performance.

(d) the Respondent has failed to properly and fairly administer his staff, specifically the Applicant, by:

(i) giving her inappropriate and or insufficiently defined assignments,

(ii) allowing her performance to be judged on the basis of ill-defined criteria in the absence of a proper job description.

...

8. Wherefore the Applicant most respectfully requests the Administrative Tribunal to order:

(a) the Applicant's reinstatement in UNIC [United Nations Information Centre] in an appropriate post commensurate with her qualifications and experience,

(b) her record of service in UNIC be effectively cleared of all prejudicial assessments to show that she has performed her functions with the competence and dedication required of a staff member of the United Nations,

(c) the payment of compensation for the disruption to the Applicant's career of an amount equivalent to four years net base salary at her grade G-6,

(d) the further payment of compensation for the moral suffering and prejudice inflicted on the Applicant in an amount equivalent to two years net base salary at G-6."

Whereas the Respondent filed his answer on 24 February 1992;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 January 1982. She was initially offered a three-month fixed-term appointment as a Secretary at the G-6 level at the United Nations Information Centre (UNIC) in Algiers. She served thereafter on a succession of fixed-term contracts of varying duration, the last expiring on 31 December 1990.

During her service with the United Nations, the Applicant's performance was evaluated in six performance evaluation reports. In the first three performance reports, covering the period 1 January 1982 to 23 June 1984, the Applicant's overall performance

was rated as "a very good performance". In the fourth performance report, covering the period 1 November 1984 to 31 March 1985, and the fifth performance report, covering the period 1 April 1985 to 31 March 1987, the Applicant's overall performance was rated "fair". The Applicant instituted a rebuttal against the fifth performance report. In its report dated 3 December 1987, the Rebuttal Panel which conducted its investigation in accordance with administrative instruction ST/AI/240/Rev.2, did not advise altering the ratings in the performance report. On the other hand, it recommended the deletion from an attachment to the fifth performance report of a paragraph which referred to the Applicant's "superficial attitude" in fulfilling "her administrative responsibilities" and her "lack of interest and knowledge" in those areas. The Panel also recommended that the Applicant's duties should be defined more clearly.

On 4 April 1988, in her appraisal of the Panel's report, the Under-Secretary-General for Public Information accepted these recommendations and agreed that "in small offices away from Headquarters staff should to the extent possible assist in areas other than those which apply strictly to a particular job" and that there was "a need to more clearly define [the Applicant's] duties and responsibilities bearing in mind the nature of a consolidated office". She also recommended that "an updated job description for the post of Secretary, UNIC Algiers should be prepared".

On 8 May 1990, the Applicant signed her sixth performance report, covering the period 1 June 1988 to 31 March 1990, in which her overall performance was rated "fair". The Applicant did not institute a rebuttal to this report.

On 5 September 1990, the Applicant requested the Secretary-General to review the administrative decision not to renew her fixed-term appointment beyond 31 December 1990. In her request, the Applicant argued:

> "I did not contest the latest performance evaluation report, which I signed on 8 May 1990, because I was discouraged by the fact that nothing came of the objections to the report covering the period 1 April 1985 to

31 March 1987. Headquarters responded to my objections by asking me to name a Panel (choose three from five nominees). The Panel interviewed me on one occasion and asked me a series of questions, which I answered ... Since then, absolutely nothing.

In signing the latest report, I was merely acknowledging receipt."

On 30 October 1990, the Applicant lodged an appeal with the Joint Appeals Board. In a cable dated 26 November 1990, the Applicant asked the Secretary of the Board for a stay of action on the decision not to extend her fixed-term appointment. The Board adopted its report on this question on 21 December 1990, recommending against the Applicant's request. The Secretary-General accepted this recommendation on 8 January 1991. The Board adopted its report on the merits of the case on 20 June 1991. Its conclusions and recommendation read as follows:

"Considerations

9. The Panel considered that in this case, as in any appeal of a decision not to extend a fixed-term appointment, it was not called on to re-evaluate Appellant's performance. It was called upon to determine whether there was any indication of prejudice or other extraneous factor affecting the decision not to extend, and whether Appellant had been given any reason to expect that an extension would be granted.

10. The Panel had already noted 'the absence of any allegation of prejudice or other extraneous factor by the Appellant' in its Report No. 810 on Appellant's request for suspension of action. No such allegation was made in subsequent communications or submissions from Appellant.

11. The Panel could find no indication that would justify an expectation of renewal of contract by Appellant. It felt, in fact, that the succession of brief fixed-term extensions granted to Appellant could only be interpreted as confirming the specific duration of the contractual commitment. The Panel noted in this connection the exchange of cables between Headquarters and the Resident Representative Director, UNIC, in August 1990, in which the latter stated 'I personally feel she should be given decent time to prepare herself and look around for another job,' and which ultimately led to her final four-month extension.

12. In reviewing the arguments of Appellant's Counsel, the Panel found nothing that touched on the two essential points of consideration. It did find evidence which tended to weaken the force of Counsel's contentions. For example, the memorandum of 5 April 1988 from the Executive Officer, DPI [Department of Public Information], transmitting the appraisal of Appellant's rebuttal to OHRM [Office for Human Resources Management] indicates that copies were being sent to Appellant and to the Resident Representative, Algiers. Appellant's statement that she never received it must, thus, be considered as 'not proven'. More substantively, the appraisal of the Under-Secretary-General for Public Information confirmed the validity of the assumptions underlying the evaluation of Appellant's performance. Finally, the Panel could discern no causal link between the absence of a job description and the decision not to extend Appellant's appointment.

Recommendation

13. The Panel, therefore, decides to make no recommendation with respect to this appeal."

On 25 June 1991, the Officer-in-Charge, Department of Administration and Management, transmitted to the Applicant a copy of the Board's report and informed her that the Secretary-General had re-examined her case in the light of the Board's report and had decided to maintain the contested decision.

On 24 September 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision not to renew the Applicant's fixed-term appointment was based on an ill-founded assessment of her performance.

2. The failure to implement the decision of the Under-Secretary-General for Public Information that "an updated job description for the post of secretary, UNIC Algiers should be prepared" was a managerial deficiency that affected the Applicant's rights.

3. The Respondent did not evaluate the Applicant's services for the periods April 1987 to May 1988 and April to December 1990.

Whereas the Respondent's principal contentions are:

1. Fixed-term appointments expire on the date indicated therein and neither prior renewals nor outstanding performance create a legal expectancy of renewal.

2. The Applicant received reasonable consideration for a career appointment pursuant to General Assembly resolution 37/126 of 17 December 1982.

The Tribunal, having deliberated from 29 October to 17 November 1992, now pronounces the following judgement:

I. The Applicant contests the Secretary-General's decision following a unanimous recommendation by the Joint Appeals Board, which rejected the appeal filed after the decision by the Administration of the United Nations Information Centre in Algiers not to renew her fixed-term appointment beyond 31 December 1990. The Applicant considers that the decision was based on an erroneous assessment of her merits. In addition, she considers that the decision resulted from managerial deficiency.

II. In his pleas, the Respondent requests that the application should be rejected, arguing, first of all, that under the Staff Regulations, a fixed-term appointment expires on the date indicated therein and neither prior renewals nor extensions create a legal expectancy of renewal.

The Respondent adds that the Applicant's administrative situation received consideration, pursuant to General Assembly resolution 37/126 of 17 December 1982.

III. The Tribunal notes that, as it has constantly affirmed in its decisions, under the provisions of the Staff Rules and Regulations, a fixed-term appointment normally ends on its expiration date, and prior renewals cannot create, for the staff member, a legal expectancy of renewal or conversion to any other type of appointment

(see Judgement No. 173, Papaleontiou, para. II; Judgement No. 205, El Naggar, para. IV; Judgement No. 427, Raj, para. XI; Judgement No. 440, Shankar, para. IV; Judgement No. 496, B, paras. V-IX; and Judgement No. 471, Byfield, para. XIII).

IV. The present case concerns a fixed-term appointment that was due to expire on the date indicated therein. Accordingly, the Secretary-General acted well within his discretionary authority in not renewing the appointment. The Tribunal also notes that in this case the Administration was not motivated by factors extraneous to the interests of the service (see Judgement No. 312, Roberts, paras. VI and VII; Judgement No. 494, Rezene, para. XIX; and Judgement No. 561, Edussuriya, para. III). The Applicant fails to establish the existence of injury for which the Administration is liable and for which redress is available. Lastly, the Tribunal notes that the Applicant does not base her claim for the renewal of the appointment on conclusive evidence or on any promise of renewal shown by the circumstances of the case (see Judgement No. 267, Adler, para. XXIV; and Judgement No. 440, Shankar, para. V).

On the contrary, the Tribunal notes that in the exchange of communications between Headquarters and the UNDP Resident Representative, who was then also Director of the United Nations Information Centre in Algiers, the latter wrote (in August 1990), in connection with the Applicant's administrative situation: "I personally feel she should be given decent time to prepare herself and look around for another job." Thus, the Applicant cannot claim that the Administration gave her any legal expectancy of renewal of appointment. It follows, that all those contentions should be rejected.

V. The Tribunal notes that between 1987 and 1988 and between 3 April and 3 December 1990, there was no evaluation of the Applicant's performance, even though that was required, under administrative instruction ST/AI/240. The Tribunal further notes that the Applicant's duties had not been clearly defined.

Nevertheless, the Tribunal considers that those shortcomings, while regrettable, did not have the effect of making the decision an improper one.

VI. For the foregoing reasons, the Tribunal rejects the application.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Hubert THIERRY
Member

Mikuin Leliel BALANDA
Member

New York, 17 November 1992

R. Maria VICIEN-MILBURN
Executive Secretary